79-197

Supreme Court, U. S.
FILED
OCT 17 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court
of the United States

OCTOBER TERM, 1979

STAN SKOKO, RALPH GROENER and ROBERT SCHUMACHER, Board of County Commissioners, on behalf of CLACKAMAS COUNTY, OREGON, a Political Subdivision of the State of Oregon,

Petitioners,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES, and W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents,

and

JEANETTE SIMERVILLE, LARRY CALLAHAN and DALE D. SCHROCK, Board of County Commissioners, on behalf of BENTON COUNTY, OREGON, et al,

PETITIONERS' REPLY TO RESPONDENTS' SECRETARIES' BRIEF IN OPPOSITION

DONALD C. WALKER
2302 Lloyd Center,
Portland, OR 97232

KENNETH E. SHETTERLY
189 S. W. Academy,
Dallas, OR 97338

Intervenor-Respondents.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 10-79

SUBJECT INDEX

	Page
Petitioners' Reply to Respondents' Brief in Opposition	1
Statement Additions	1
Answer to Argument	6
Appropriation Bills as Construed by Secretaries is Deception	6
Secretaries Should Not Impute Bad Faith to Congress	8
Past Record No Help to Secretaries	9
Definition of Terms	10
McCulloch v. Maryland, 17 U.S. 315 Supports Dual Sovereignty	11
O&C Issue Is Festering	12
Authorities of Solicitor More Helpful to Clackamas County	14
Secretaries Ignore Legislative History	15
Proof Positive of Legislative Intent	16
Duty of All Counsel	18
Conclusion	19

TABLE OF AUTHORITIES

Cases	*Page*
Boesche v. *Udall*, 374 U.S. 472 (1963)	9
City of Los Angeles v. *Adams* 556 F. 2d 40	10, 14
Johnson v. *McIntosh*, 8 Wheat. 543, 5 L. Ed. 681	10
McCulloch v. *Maryland*, 17 U.S. 315 @ 410	11
Red Lion Broadcasting Co. v. *FCC*, 395 U.S. 367 (1969)	9
St. Paul v. *Chicago R. Co.*, 45 Minn. 387, 48 N.W. 17	10
TVA v. *Hill*, 437 U.S. 153 (1978)	10, 14
U.S. v. *O&C R.R. Co.*, 238 U.S. 393 @ 434	4, 11, 12
Statutes	
Chamberlain-Ferris Act 39 Stat. 218	4, 11, 12
McNary Act 50 Stat. 874	2, 3, 4, 6, 7, 8, 12, 15, 16
Other	
Hearings before Committee on Public Lands	15
Hearings Before Senate Sub-Com. of Comm. on Appropriations	15, 16, 17

In the Supreme Court
of the United States

OCTOBER TERM, 1979

STAN SKOKO, RALPH GROENER and ROBERT SCHUMACHER, Board of County Commissioners, on behalf of CLACKAMAS COUNTY, OREGON, a Political Subdivision of the State of Oregon,

Petitioners,

v.

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR OF THE UNITED STATES, and W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY OF THE UNITED STATES,

Respondents,

and

JEANETTE SIMERVILLE, LARRY CALLAHAN and DALE D. SCHROCK, Board of County Commissioners, on behalf of BENTON COUNTY, OREGON, et al,

Intervenor-Respondents.

PETITIONERS' REPLY TO RESPONDENTS' SECRETARIES' BRIEF IN OPPOSITION

STATEMENT ADDITIONS

On page 6 of the Secretaries' brief the following statement is made: ". . . Faced with the prospect that the full 75 percent might go to the counties, and concerned that the 75 percent share *was overly generous*, Congress reviewed the distribution scheme."

The reference to "overgenerosity" also is taken out of historical context.

The facts are as follows: In 1952 the formula was distributed 75-25% in accordance with Title II of the McNary Act.

In 1953, the timber cut was not enormous and there was a desire to open up some of the O&C forest land and the need was for the building of the Smith River Road in Southern Oregon.

The cost of this road was not affordable out of the fourth 25 percent; hence, the then Congressman Henry Jackson and others objected to an appropriation out of the general treasury because of the "inordinate" amount the counties were receiving as contrasted to national forest lands (25 - 75% in favor of the Federal government).

Consequently the first appropriation bill was to finance the $2,700,000 Smith River Road project out of the general fund and make it a reimbursable item.

This practice was continued on a specific project basis until 1960 when the entire third 25 percent was appropriated and made a reimbursable item.

Now, here is what the Secretaries *are not* telling the Court. After appropriating the third 25 percent, the Secretaries are using the third 25 percent as the main source for administration and using a smaller and only a nominal amount of the fourth 25 percent. This is a major policy change and accomplished by silence and implication.

It is circumvention of the law at its worst.

For example, in 1977 the total of the receipts was

$212,090,848. The counties received 50 percent, or $106,045,424. The next, or third 25 percent, of $53,-022,712 was used for roads, improvements (administration), and only $2,153,880 was spent out of the fourth 25 percent for administration. This unfair practice has been followed annually before and after.

The McNary Act, 50 Stat. 874, provides for administration and that is supposed to be out of the fourth 25 percent. Administration of the O&C lands encompasses road improvements and the entire expense of managing these lands.

What the Secretaries are wrongfully doing is piling up a surplus by not spending the fourth 25 percent for administration—using the third 25 percent for administration, and then refusing to take the surplus of the fourth 25 percent as paragraph C of Title II states and charge it off against the reimbursable item. If paragraph C was followed, everything would be fair and correct, namely, that the fourth 25 percent would bear the burden of management. If the fourth 25 percent was insufficient and more was needed to manage the lands, it would be handled by the reimbursable item that the Act provides.

It should be remembered that the O&C lands are self-supporting and not a burden on the U.S. Taxpayer.

Why is it then that the Secretaries should misconstrue the appropriation bills and by doing so give the federal government a large profit on lands that are sovereign to Oregon? It violates the principle of dual

sovereignty, and for the Solicitor to say there is "no merit to our argument," he has to ignore the definition of "absolute title"; he has to ignore the sacred fundamental of dual sovereignty and he has to ignore the historical sequence of events that has made this problem so unique.

Its uniqueness deserves unique treatment, especially when all Clackamas County is asking is that our basic Constitutional and legal fundamentals prevail.

The gist of the matter is that the United States Supreme Court case *U. S.* v. *O&C R.R. Co.*, 238 U.S. 393 at 434 declared that *absolute title* was in the Railroad and such declaration reversed the condition subsequent and reverter decree of the lower court. This Court then required that the Railroad carry out the intent and purpose of the original granting Acts by enforcing the covenant that the lands be available to settlers rather than timber speculators.

It was this provision of the Decree that was the basis of the Chamberlain-Ferris Act. Certainly Congress could not go beyond the court decree which means that the 1916 "revestment" act was within the spirit of the court decree and not in defiance of it. Consequently the revestment was for a limited purpose and not to place the lands back in the public domain and defeat Oregon's sovereignty that had already attached.

The next milestone is the McNary Act of 1937 that for the first time changed the policy of the original granting acts by providing for substantial yield of the lands rather than settlement.

To be fair it was necessary to recognize Oregon's unique status in the lands; hence, the unusual formula.

Now, the Secretaries are attempting to take advantage of the appropriation bills by construing them in such a manner that the Oregon Counties are deprived of timber revenues that justly belong to them.

The Solicitor shockingly and without authority states there is no merit to our contention of state sovereignty. Such a remark is tantamount to denying the novel constitutional principle of dual sovereignty.

This unique fundamental of our constitutional system was early recognized by de Tocqueville, one of the most astute scholars of our Constitution, who said about dual sovereignty that it was based "upon a wholly novel theory which may be considered a great discovery in modern political science. . . ."

Previous to our adoption of the Constitution, no government had thought it possible to divide sovereignty. The great experiment has worked. Modern conditions have threatened its existence due to the present day tendency toward centralization.

Nowhere in American history will this issue be in greater focus or confrontation than exists in this present case.

The wrongful construction of the appropriation bills will have the effect of destroying this unique balance of separate spheres of national and local governments.

The creation of such a novel system is one of the great achievements in the political history of mankind and its perpetuation by judicial protection will be an equal achievement.

Therefore, constitutional fundamentals are an important tool in statutory construction. These tools have not been used.

ANSWER TO ARGUMENT

Appropriation Bills as Construed by Secretaries Is Deception.

On page 8 of the Secretaries' brief they make the following statement: "Congress has thus decided that the O&C Counties are to receive 50 percent of the annual revenues, not 75 percent; the 25 percent share that the counties do not receive directly is allocated to maintaining and improving the O&C lands."

The substantive law (McNary Act, supra) clearly earmarks the fourth 25 percent for administration. The appropriation bills do not eliminate this duty. For Congress to do what the Secretaries claim, they would have to have a substantive amendment to eliminate Paragraph C and that cannot be done by a silent appropriation bill that says nothing about removing the obligations of Paragraph C as to handling any surplus.

The sad part of this long saga is that Congress was advised by the Secretary of Interior of the need of specific projects over and above the fourth 25 percent and these appropriation bills were a vehicle to accomplish that purpose. This was the practice from 1953 to 1960.

From 1960 on, the improper practice has been carried on.

The argument is made that if Congress wanted the fourth 25 percent to be used for administration, it would have so provided (page 9).

Paragraph C of Title II very clearly states: (C) "25% to be available *for the administration of this Act*, in such annual amounts as the Congress shall from time to time determine."

A fair reading of Title II read in conjunction with Title I clearly reveals how the first 75 percent is to be allocated. Nothing in the 75 percent is for administration; then the fourth 25 percent is allocated for that purpose.

This is not an ordinary law. It does not effect the rest of the nation. It is not a general law, but a law that was the outgrowth of the 1915 Supreme Court decision.

To emasculate that law by a silent appropriation bill certainly is not what Congress intended.

The argument is much stronger that if Congress wanted to eliminate the surplus provision of Paragraph C, it would have done so *expressly* and long ago.

That portion of Paragraph C reads as follows: "Any part of such percentum (fourth 25%) not used for administration purposes shall be covered into the general fund of the Treasury of the U. S. *PRO-*

VIDED, that moneys covered into the Treasury in such manner shall be used to satisfy the reimbursable charges against the O&C land grant fund mentioned in subsection (b) so long as any such charges shall exist."

Anyone can read every annual appropriation bill from 1953 through 1979 and not find one such appropriation bill that eliminates the responsibility of Paragraph C—*the surplus* still has to be charged off against the reimbursable item of paragraph B.

Secretaries Should Not Impute Bad Faith to Congress

For the Secretaries to say that Congress intended Paragraph C to be eliminated by silent appropriation bills is to impute to Congress a deceptive and unconstitutional intent.

The Congress was led to believe that the fourth 25 percent was insufficient to handle the expense of administration.

Would it be reasonable to believe that if Congress intended to change the substantive formula of the Act that it would do it by circumvention of passing annual appropriation bills, and not do it in an open and honest fashion of holding hearings on the substantive Act? Clackamas county refuses to believe that the Congress would conduct such an important matter in such a shabby matter.

Past Record No Help to Secretaries

On page 10 of their brief the Solicitor General states, ". . . By its successive reenactment of the proviso language with knowledge of this interpretation, Congress has implicitly ratified respondent's construction of the statutory scheme and their method of distribution. . . ." Citing case and the language of the *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 at 381 (1969) states: ". . . unless there are compelling indications that it is wrong."

Here there are overwhelming reasons why serious error is being committed. Error is that the Secretaries and Congress neither have the right to interpret or ratify an appropriation bill that diminishes the sovereignty of Oregon.

The Solicitor cites *Red Lion Broadcasting*, supra, and *Boesche* v. *Udall*, 374 U.S. 472 (1963).

Both of these cases are situations where the federal government has the right to regulate. The *Red Lion* case has to do with FCC matters and the "fairness doctrine" and the *Boesche* case deals with mineral leases on public lands.

These are O&C lands with vested Oregon rights and are NOT part of the public domain. Citing the passage of years as a basis for their construction gives them no aid. Just like a court that never had jurisdiction in the first place, subsequent orders and decrees can have no meaning. They have been divested from the U.S.—Oregon sovereignty attached—they were on Oregon's tax rolls. There has been no purchase, no

condemnation, no ceding. How, under our system of dual sovereignty can the federal government retake land by an Act of Congress, and more shockingly, by the wrongful construction of a silent appropriation bill?

To amend the McNary Act by implication or silence runs contra to every case cited and particularly the *TVA* v. *Hill*, 437 U.S. 153 (1978) and *City of Los Angeles* v. *Adams*, 556 F.2d 40 which corroborates Clackamas County's position and not the Secretaries.

Definition of Terms

ABSOLUTE TITLE. Black's Law Dictionary defines "absolute title" as follows: "As applied to title to land, an 'absolute' title means an exclusive title, or at least a title which excludes all others not compatible with it; an absolute title to land cannot exist at the same time in different persons *or in different governments. Johnson* v. *McIntosh*, 8 Wheat. 543, 588, 5 L. Ed. 681."

SOVEREIGN RIGHT. "A right which the state alone, or some of its governmental agencies can possess, and which it possesses in the character of a sovereign for common benefit and to enable it to carry out its proper functions; distinguished for such 'proprietary' rights as a state, like any private person, may have in property or demands which it owns." Black's Law Dict. Third Ed., p. 1643, also *St. Paul* v. *Chicago R. Co.*, 45 Minn. 387, 48 N.W. 17.

McCulloch v. Maryland, 17 U.S. 315 Supports Dual Sovereignty

Oregon's position of sovereignty is strongly supported by the straightforward language of *McCulloch* v. *Maryland.* Chief Justice Marshall, on page 410, states: "In America, the powers of sovereignty are divided between the government of the union and those of the states. *They are each sovereign with respect to the objects committed to the other.*" Title to O&C lands being in a private party commits them to state sovereignty. (Best Evidence: O&C lands for years were on the Oregon tax rolls.)

The Secretaries' argument never came face to face with basic fundamentals of the O&C history. What did they ignore?

1. They ignore 238 U.S. 393, at 434, where this court said "absolute title" was in the O&C R.R. Co., a private party. This court had just reversed the lower court where a condition subsequent was declared and the resulting reverting of these lands to federal government. This court said *No* (1915), and the lands did not revert. That rule has never been changed. When absolute title is declared, the incident of state sovereignty also attaches and cannot be rendered asunder merely by an Act of Congress and certainly not by a silent appropriation bill.

The anomaly that follows occurred in 1916 (Chamberlain-Ferris Act). 39 Stat. 218. The Railroad Co. had violated an enforceable covenant (not condition subsequent) and to correct this breach the U. S. Su-

preme Court stated, 238 U.S. 393 at 437, either Congress must remedy the breach or the local District Court would do so.

The anomaly is that the Chamberlain-Ferris Act, supra, was called the "Revestment Act" and the land was transferred back to the U.S. government. But for what purpose? NOT to put it back in the public domain, but for the General Land Office to have title so it could convey to settlers. The intent was to carry out the purpose of the original granting acts and not to defeat them.

The Secretaries and the Solicitor are allowing the passage of time to dull the memories of the true intent of this court's opinion.

2. They ignore the historical change of policy in the McNary Act that changed the policy of settlement of lands (Granting Acts) to sustained yield. This policy change recognized the unique status of these lands and consequently the unique formula of 75-25 percent.

O&C Issue Is Festering

The O&C issue for years has been kept in the dark. High school and college history books are strangely silent on this 113 year vital-to-Oregon body of knowledge. Our congressmen and senators stand mute. Senator Robert Packwood was quoted, in the Medford Mail Tribune, as saying, "The less said about O&C, the better." Congressman Robert Weaver has said, in

the Portland Oregonian, "Don't rock the boat or the Eastern congressmen will take it away from us."

These are statements of fear and expediency. None has ever said these lands do not belong to Oregon. In fact they all admit it, but they lack confidence that law and justice will prevail.

More and more articles are appearing in Oregon's newspapers, many letters to the editors and telecasters have been talking about the O&C lands. The people are now awakening and know that this problem has been shockingly and shamefully mishandled throughout the years by political leaders' acquiescence or lack of knowledge of the subject.

It is not healthy for the Union to have one of its sister states feel so aggrieved.

Some Oregon political leaders are standing up. The then Secretary of State, and now State Treasurer (See. Pet. App. U), the Clackamas County Commissioners and others, and the number is growing and the public is now realizing the grave errors of the past. The judge in the District Court indicated the fairness of Clackamas County's contentions when he stated, Tr. 73:

> "I think many fairminded people may agree with Mr. Walker and that if jurisdiction was not a hurdle and simple fairness was the only test I need apply, he might well carry the day. . . ."

The magnitude and concern of this issue deserve a full hearing. The rights are by law established. Only the judiciary can unscramble the chaos that presently exists.

Authorities of Solicitor More Helpful to Clackamas County

First: The Solicitor cites *City of Los Angeles* v. *Adams*, and *TVA* v. *Hill* as authorities that appropriation bills can amend substantive legislation. The language of these cases is forceful that appropriation bills *cannot*, by implication, accomplish that result.

Second: The authorities of *Red Lion Broadcasting Co.* v. *FCC, supra*, and *Boesche* v. *Udall, supra*, are far removed from our fact situation. The "passage of time" argument is of no consequence as stated on p. 381 of the *Red Lion* case "unless there are compelling indications that it is wrong." Reclaiming state sovereignty is that type of compelling indication.

Third: The cases supporting acquisition of property by the U. S. are not in point. The Solicitor cannot point to any such "acquisition" as the O&C lands and establish valid title in the U. S.

Fourth: The Solicitor cites the basic case of *U. S.* v. *O&C R.R. Co., supra*, and *O&C R.R. Co.* v. *U. S.*, 243 U.S. 549, for the proposition that all the federal government had to do was to secure the railroad full value of the grant. Such a cursory glance at those cases is extremely misleading. The first case establishing the proposition of "absolute title" and the ensuing incidents of sovereignty inure to Oregon. The second case was between the government and the Railroad and does not resolve the question of Oregon's sovereignty over these lands.

An opportunity to fully examine all authorities

cited will weigh heavily in favor of Clackamas County. Starting with constitutional principles and extending through statutory construction arguments will reveal logic and consistency in favor of Clackamas County's contention that these appropriation bills do not destroy the viability of Paragraph C, Title II. It still works.

Secretaries Ignore Legislative History

Even though the language of Title II, and particularly paragraph C, is plain and unambiguous there is an abundance of legislative history that reflects the state of mind of Congress.

The McNary Act was the outgrowth of a long and unique federal-state problem.

Hearings Before Committee on Public Lands, 64th Congrss, February 17, 1916-March 14, 1916.

Hearings Before Committee on Public Lands, H.B. 5858, 75th Congrss, April 13, 1937.

Hearings Before Committee on Public Lands, 78th Congress, May 6-7, 1943; U.S. Senate R-1011, R-132-156.

Hearings—Sub-Committee of the Senate Appropriations on SR 7176, 82nd Congress, 2nd Session, April 16-May 16, 1952, p. 1543.

Just a sampling will show the thinking of those times.

Also see remarks of Guy Cordon (later U. S. Senator Cordon), and one of the chief contributors of the

McNary Act, at App. O, of Petition for Certiorari, page 74. Also see App. N, and App. F, (Congressman Mott).

Proof Positive of Legislative Intent

The Solicitor General, in his argument, has contended that the legislative history favors the Secretaries' construction of the present procedures. As previously stated, the appropriation bills started in 1953 and nothing could be more clear than that we will now present in this brief to show what the intent was of the original appropriation bill and that language has been unchanged throughout the years.

See Hearings Before the Senate Subcom. of the Comm. on Appropriations, 82nd Cong., 2d Sess., p. 1533 (1952). Senator Cordon (chief architect) then proposed an amendment which is the basis of the present lawsuit, and this is agreed to by the defendants in the original record, R. 53. (Smith River Road)

Senator CORDON. . .

> "I believe, Mr. Chairman, that we would maintain our policy as it stands and that *would fit* the repayment of this access road money *into the present pattern* of this legislation and more logically in lieu of it, I suggest we use this language, and I am only reading the last proviso.
>
> *Provided further;* That said sum of $2,750,000 is hereby made a reimbursible charge against the Oregon and California land-grant fund and shall be reimbursed to the general fund in the Treasury in accordance with the provisions of the second paragraph of subsection (b) of title II, of the act of August 28, 1937 (50 Stat. 875).

> That language substituted for this would provide the whole of the access roads and provided for in this appropriation should be a charge against that second 25 percent of receipts. *It would mean so far as the Government is concerned that the counties from their 75 percent would be paying the whole of the access roads.* It would mean so far as the Government was concerned that the money would be paid back I think within the year because *within that 25 percent there would be more than enough to pay that all back.* . . .
>
> Mr. Chairman, to me it is a sound approach. It does not require any new accounts. *It does not require any new procedure. The procedure is set up now under existing law.* The O. & C. fund must remain in existence. Here we would have a capital investment on account of the lands *charged in as were the other capital investments,* including the one by which the lands were bought. . . ." *Id.* at 1543-44.

The above statement by Senator Cordon reflects the following:

(1) That we would maintain our policy as it stands. (Paragraph C is part of that policy.)

(2) And that would fit the repayment of this access road money into the present pattern of this legislation. (The present pattern is paragraph C.)

(3) It does not require any new procedure. The procedure is set up under existing law. (The existing procedure is paragraph C, both in 1953 and continuing throughout all the years.)

(4) Here we would have a capital investment on account of the lands charged in as were the other capital investments, including the one by which the lands were bought. This language is conclusively clear that the appropriation bill fitted into the existing pattern and procedures, and these procedures are the ones that are being avoided and not followed by the Secretaries.

Senator Guy Cordon's remarks completely corroborate our contention that any *new* reimbursible item created by an appropriation bill fits into the existing machinery of Title II, and Paragraph C is part of that existing machinery.

Duty of All Counsel

Our system of justice is based on the advocacy system. Most cases involve economic problems and often obscure or technical rules of justice, but this one is different. It brings into the judicial arena a monumental confrontation that tests whether the constitutional fundamentals will work. It tests whether the federal-state relationship is really based on dual sovereignty, or whether sheer political power can overrun a state and county's rights.

No counsel, regardless of which side he represents, has the right by advocacy to destroy that precious balance of the Constitution that brings the Union into being and hopefully perpetuates such a great system.

Some of the counties oppose Clackamas County as they did unsuccessfully 25 years ago. They should be

reminded of Jefferson's thought that the truth may well come from the minority as well as from the majority.

Clackamas County will rest its case on the underlying principles of the United States Constitution and basic rules of statutory construction. The Solicitor General, by refusing to accept the doctrine of dual sovereignty, is in serious error.

CONCLUSION

The unique and novel questions presented in the O&C case are highly important, both to Oregon and the federal government.

1. *Past:* Rights have accrued where non-discretionary sums are due the 18 O&C Counties.

2. *Future:* Growing differences of opinion will continue to create an unhealthy atmosphere between Oregon and the federal government. A definite answer based on legal and constitutional principles will restore harmony rather than discord.

The spirit of the UNION will be served by a full hearing.

Respectfully submitted,

DONALD C. WALKER
Of Attorneys for Petitioners